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No. 01-1546

Supreme Court U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY.
Petitioner,

v.

DOSSEY DOUGLAS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
PAMELA SMITH-STEWARD
Chief Assistant Attorney General
DAVID S. CHANEY
Senior Assistant Attorney General
DENNIS W. DAWSON
MIGUEL A. NERI
Supervising Deputy Attorneys General
*T. MICHELLE LAIRD
Deputy Attorney General
*Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2323
Fax: (619) 645-2581
Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether time-barred disability discrimination claims based on an express denial of employment for failure to meet a hiring standard are revived by the continuing violation doctrine where the plaintiff re-applies for the position during the limitations period and while the hiring standard is still in effect, but there is no application of the hiring standard to the plaintiff within the limitations period.

2. Whether the Ninth Circuit contradicted U.S. Supreme Court decisional authority, stating that collateral appeals of an employment decision do not serve to toll limitations periods, by concluding that the plaintiff's claims were timely under the continuing violation doctrine because he acted reasonably during the limitations period by pursuing collateral appeals of a denial of employment and re-applying for the position, rather than filing suit.

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CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,
Petitioner,

v.

DOSSEY DOUGLAS, *Respondent.*

INTRODUCTION

On April 18, 2002, this Court docketed Petitioner California Department of the Youth Authority's petition for writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit in *Douglas v. California Department of Youth Authority*, 271 F.3d 812 (9th Cir. 2001), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002) (O'Scannlain, J. dissenting). On May 20, 2002, Respondent, Dossey Douglas, filed a brief in opposition to the petition and a conditional cross-petition for writ of certiorari. On May 28, 2002, the briefs were distributed for a June 13, 2002 conference.

On June 10, 2002, this Court issued its decision in *National Railroad Passenger Corporation v. Morgan*, ___U.S. ___, 2002 U.S. LEXIS 4214 (2002) (O'Connor, J. concurring in part and dissenting in part). This Court's decision in *Morgan* further demonstrates why certiorari should be granted in this case.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT'S HOLDING IN *NATIONAL RAILROAD PASSENGER CORPORATION v. MORGAN* APPLIES THE APPLICABLE LIMITATION PERIODS TO EMPLOYMENT DISCRIMINATION CASES IN THE MANNER ADVOCATED BY PETITIONER AND SUPPORTS GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. The Ninth Circuit's Decision In *Douglas* Conflicts With This Court's Decision In *Morgan* Regarding The Application Of The Relevant Statutes Of Limitation To Discrete Acts Of Alleged Employment Discrimination

On June 10, 2002, this Court issued its decision in *National Railroad Passenger Corporation v. Morgan*, ___U.S. ___, 2002 U.S. LEXIS 4214 (2002). In *Morgan*, this Court overturned, in part, a decision of the Court of Appeal for the Ninth Circuit, where the appellate court had applied the continuing violation doctrine to save otherwise time-barred Title VII claims based on discrete acts of alleged discrimination. *Morgan* held, unanimously, that the relevant statute of limitations -- which is the same for employment discrimination cases under both Title VII of the Civil Rights Act and Title I of the Americans with Disabilities Act -- "precludes recovery for discrete acts of discrimination ... that occur outside the statutory time period." This Court further stated that the term "unlawful employment practice" includes a discrete act such as the failure

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or refusal to hire an individual. This Court said, "[t]here is simply no indication that the [statutory] term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." Thus, this Court concluded,

> ...discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred.

National Railroad Passenger Corporation v. Morgan, 2002 U.S. Lexis 4214

This Court then stated that the "unlawful employment practice" or "discriminatory act," "'occurred' on the day that it 'happened.'" Furthermore, this Court recognized that "[d]iscrete acts, such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination ... constitutes a separate actionable 'unlawful employment practice.'"

Accordingly, this Court has held, unanimously and in no uncertain terms, that a discrete act of alleged employment discrimination, such as a denial of employment, starts the statute of limitations to run, and that no later discrete act, even if related, will make actionable an earlier time-barred discrete act.

The rule espoused in *Morgan* is the rule of law advocated by Petitioner, both in the court of appeal and by way of its petition for writ of certiorari. Were the *Morgan* rule applied to the facts in *Douglas*, the compelled conclusion would be that Respondent's EEOC charge, filed 413 days after he was informed of his rejection for hire due to his failure to meet Petitioner's color vision standards, was untimely. In addition,

the *Morgan* rule would result in a determination that Respondent's Rehabilitation Act claim, which was filed in federal court on July 6, 1998, was also untimely, because it was filed more than one year after Petitioner informed Respondent of his rejection. CAL. CIV. PROC. CODE § 340(3) (West 1999).

This conclusion is compelled by *Morgan* whether or not Respondent re-applied, within the limitations period, for the position he was earlier rejected for and at a time when Respondent's color vision standard was still in place. *Morgan* holds that any subsequent alleged "acts" of discrimination "start a new clock for filing charges alleging that act." Thus, the court of appeal was required to consider Respondent's second job application as a potentially separate discrete "unlawful employment practice" or "discriminatory act," by Petitioner, and not, as it did, as a means of extending the accrual of the limitations period which commenced on the express denial of Respondent's initial job application based on his failure to meet Petitioner's color vision standards.

The "discrete act" analysis in *Morgan,* and its holding that the limitations period begins to run upon the occurrence of a rejection for hire, corresponds to the issues raised by Petitioner in its petition for writ of certiorari. This Court's opinion in *Morgan* thus supports the granting of the writ in this case.

B. The *Morgan* Decision Rejected The Application Of The *Galloway* Test, Which Was Relied Upon By The Ninth Circuit In Its Alternate Holding In Douglas

The *Morgan* decision additionally set forth a standard for the application of limitations periods in Title VII hostile work environment claims. While the established standard itself is not pertinent to this case because this case does not involve allegations of a hostile work environment, this Court's underlying analysis in *Morgan* on this point is significant. In

particular, in establishing a test for determining the timeliness of hostile work environment claims, a majority of this Court specifically rejected the application of the test espoused in *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996). The *Galloway* test allows recovery to individuals for conduct taking place outside the time period for filing a timely claim where the plaintiff reasonably did not know such conduct was discriminatory or where the discriminatory nature of such conduct is recognized as discriminatory only in light of later events. *Galloway*, 78 F.3d at 1166-68.

As discussed in the petition for writ of certiorari, the Ninth Circuit applied the *Galloway* test to the facts in *Douglas* to find that, even if it applied a strict notice requirement to the facts, it would find that the continuing violation doctrine saved Respondent's claims because "we cannot say that Douglas acted unreasonably by pursuing each avenue of appeal identified to him, and by reapplying for the position." *Douglas v. California Department of Youth Authority*, 271 F.3d at 824, n.13, *citing*, *Galloway*, 78 F.3d at 1167. The petition for writ of certiorari argues that this alternate holding is contrary to *Delaware State College v. Ricks*, 449 U.S. 250 (1980), because it is essentially the impermissible "tolling" of the limitations period during the pursuit of administrative appeals, in direct conflict with this Court's decision in *Ricks*. The *Morgan* case supplies yet another basis for granting the writ on the grounds that the court of appeal's decision is now in conflict with a second United States Supreme Court precedent. This is because the *Galloway* test, utilized by the court of appeal to save Respondent's time-barred claims in an alternate holding, was specifically rejected by *Morgan* as a means of determining the timeliness of claims of discrimination occurring outside the limitations period. Accordingly, the *Douglas* alternate holding is in conflict with two separate United States Supreme Court decisions based on two separate analyses.

II.

THERE EXISTS NO LEGAL IMPEDIMENT TO GRANTING THE PETITION FOR WRIT OF CERTIORARI

Respondent argues in his opposition to the petition that: (1) this Court "cannot decide the issue of the applicability of the continuing violation doctrine based on the inadequate record presented by [Petitioner]"; and, (2) this Court cannot grant the writ in this case because to do so would require it "to look to the law of the State of California regarding tolling" which does not implicate any federal issues. (Opp. to Pet. at pp. 7-10) As will be shown below, Respondent's reasons for opposing the petition are not meritorious.

A. State Of The Record Regarding Application Of The Continuing Violation Doctrine

Respondent states that the court of appeal held "that currently, Petitioner failed to present sufficient facts to obtain a grant of summary judgment on the issue of timeliness" and, as a result Petitioner is seeking a writ of certiorari based on "a factually deficient record." (Opp. to Pet. at p. 9.) Specifically, Respondent disputes Petitioner's statement that Petitioner's "color vision policy 'was not enforced to deny Respondent employment within the limitations period,'" as a result of Respondent's October, 1996 re-application for employment. (Opp. to Pet. at p. 9.) Respondent thus concludes that "there are factual issues to be resolved before the Petitioner can seek to bar Respondent Douglas' claims based upon the 'egal issue of timeliness." (Opp. to Pet. at pp. 8-10.)

The continuing violation doctrine is a means to save otherwise time-barred claims. As such, the burden is on the party who seeks to have the doctrine apply -- in this case,

Respondent -- to present facts sufficient to trigger the application of the doctrine. *See Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir. 1974) [party seeking benefit of rules in avoidance of statute of limitations has burden of proof to establish them], *cert. denied*, 419 U.S. 997 (1974).

Here, Respondent failed to allege either in his complaint or in his Equal Employment Opportunity Commission charge, that he had re-applied for employment with Petitioner in October, 1996. This fact was raised for the first time in this case in Respondent's opposition to Petitioner's motion for summary judgment in the district court, in an attempt to have the continuing violation doctrine apply. As the district court in this cases found, in its decision, it was Respondent who had the burden and failed to:

> ...present evidence that in this second round he was disqualified from employment on the basis of the color vision standard or that he was even required to take the color vision test. At oral argument, counsel for plaintiff [Douglas] effectively conceded that plaintiff has not been denied a position on the basis of his color-vision impairment since the CYA's March 1, 1996 decision.

(App. B -30-31.)

In any event, the Ninth Circuit's opinion does not depend on whether Petitioner actually denied Respondent employment on the basis of the color vision standard within the limitations period. *Douglas* holds that Respondent's mere efforts to apply for the desired position while the standard was in effect and within the limitations period were sufficient to establish a "continuing violation" and thus to make timely Respondent's time-barred claim based on the March 1, 1996 express denial of employment. *Douglas*, 271 F.3d at 823-24. Accordingly, the

state of the record is sufficient for this Court to decide the issues determined by the court of appeal and presented by the petition.

As for Respondent's claim that "there are factual issues to be resolved before the Petitioner can seek to bar Respondent Douglas' claims based upon the legal issue of timeliness," Petitioner cannot agree with Respondent's interpretation of the court of appeals' decision. The court of appeal's decision manifestly precludes Petitioner from re-litigating the timeliness of Respondent's claims of discrimination. Respondent does correctly quote the court of appeal as stating that "... after reviewing the facts in the light most favorable to Douglas, we conclude that he has raised material facts about whether his claim extended into 1997 and 1998, making his claims under the ADA and the Rehabilitation Act timely." However, in the preceding paragraph, the court of appeal also states that:

> [b]y reapplying in the fall of 1996 during the window for applications for hiring in 1996-1998, Douglas remained 'exposed' to CYA's discriminatory vision policy during the entire 1996-1998 period. This exposure renders his claims timely by extending the claims past the June 22, 1996 deadline for filing his ADA claim, and the July 5, 1997 deadline for filing his Rehabilitation Act claim.

Douglas, 271 F.3d at 824.

Moreover, in its concluding paragraph, the court of appeal expressly reverses "the district court's grant of summary judgment on both the Rehabilitation Act and ADA claims because we conclude that the claims were timely filed under the continuing violations doctrine." *Douglas,* 271 F.3d at 825. One cannot ignore these statements, which express the court's opinion that Respondent's claims are timely because Respondent was "exposed" to Petitioner's color vision policy

throughout 1996-1998 by re-applying for the position in the fall of 1996.

Furthermore, the court of appeal constructed an alternate holding, set forth in a footnote, which also precludes Petitioner from re-litigating the timeliness of Respondent's claims of discrimination. In its alternate holding, the court stated that "in our view, the continuing violations doctrine would apply to Douglas' claim in any case ... because we cannot say that Douglas acted unreasonably by pursuing each avenue of appeal identified to him, and by reapplying for the position." *Douglas,* 271 F.3d at 824, n.13. Thus, Respondent's interpretation of the effect of the alternate holding is also flawed.

Respondent's arguments in opposition to the petition, based on a contention that the record is insufficient and that factual issues remain to be resolved on the issue of the application of continuing violation doctrine, are without merit.

B. Tolling Under California Law

Respondent contends that this Court cannot grant the writ in this case because to do so would require it "to look to the law of the State of California regarding tolling" which does not implicate any federal issues. To the contrary, this Court can grant the writ, determine any and all federal questions properly before it, and, if necessary, remand the case for further consideration of any remaining issues in the case.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Dated: June 12, 2002

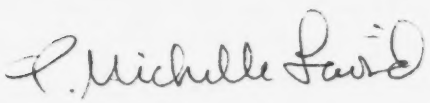
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

PAMELA SMITH-STEWARD
Chief Assistant Attorney General

DAVID S. CHANEY
Senior Assistant Attorney General

DENNIS W. DAWSON
MIGUEL A. NERI
Supervising Deputy Attorneys General



*T. MICHELLE LAIRD
Deputy Attorney General
*Counsel of Record

Counsel for Petitioner

TML:tlg
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